

## Office of the Secretary, USDA

## § 12.13

same policy, the tenant or sharecropper will be ineligible for premium subsidy on that policy in lieu of a percentage reduction on that policy.

(2) The provisions of paragraph (b)(1) of this section will not apply unless all the following are met:

(i) The tenant or sharecropper shows that a good-faith effort was made to comply by developing an approved conservation plan for the highly erodible land in a timely manner and prior to any violation of the provisions of this part;

(ii) The owner of such farm refuses to apply such a plan and prevents the tenant or sharecropper from implementing certain practices that are a part of the approved conservation plan; and

(iii) FSA determines that the lack of compliance is not a part of a scheme or device as described in § 12.10.

(3) If relief is granted under paragraph (b)(1) of this section, the tenant or sharecropper must actively apply those conservation treatment measures that are determined to be within the control of the tenant or sharecropper.

[61 FR 47025, Sept. 6, 1996, as amended at 80 FR 22881, Apr. 24, 2015]

### § 12.10 Scheme or device.

All or any part of the benefits listed in § 12.4 otherwise due a person from USDA may be withheld or required to be refunded if the person adopts or participates in adopting any scheme or device designed to evade, or which has the effect of evading, the provisions of this part. Such acts shall include, but are not limited to, concealing from USDA any information having a bearing on the application of the provisions of this part or submitting false information to USDA or creating entities for the purpose of concealing the interest of a person in a farming operation or to otherwise avoid compliance with the provisions of this part. Such acts shall also include acquiescence in, approval of, or assistance to acts which have the effect of, or the purpose of, circumventing these regulations.

### § 12.11 Action based upon advice or action of USDA.

The provisions of part 718 of this Title, as amended, relating to performance based upon the action or advice of

a County Committee (COC) or State FSA Committee shall be applicable to the provisions of this part. In addition, if it is determined by the appropriate USDA agency that the action of a person which would form the basis of any ineligibility under this part was taken by such person in good-faith reliance on erroneous advice, information, or action of any other authorized representative of USDA, the appropriate agency may make such benefits available to the extent that similar relief would be allowed under 7 CFR part 718.

### § 12.12 Appeals.

Any person who has been or who would be denied program benefits in accordance with § 12.4 as the result of any determination made in accordance with the provisions of this part may obtain a review of such determination in accordance with the administrative appeals procedures of the agency which rendered such determination. Agency appeal procedures are contained in the Code of Federal Regulations as follows: FSA, part 780 of this title; NRCS, part 614 of this title; Rural Utilities Service, part 1900, subpart B of this title.

### § 12.13 Special Federal crop insurance premium subsidy provisions.

(a) *General.* The provisions and exemptions in this section are only applicable to Federal crop insurance premium subsidies for a policy or plan of insurance under the Federal Crop Insurance Act (7 U.S.C. 1501–1524). The exemptions in this section are in addition to any that apply under § 12.5. Any conflict between this section and another will be resolved by applying this section, but only for Federal crop insurance premium subsidies. Any exemptions or relief under this section apply to Federal crop insurance premium subsidies and do not apply to other benefits even for the same person for the same crop year or reinsurance year. Unless otherwise specified in this section, the provisions in this section apply to both highly erodible land and wetlands.

(b) *Ineligibility for failing to certify compliance.* Subject to paragraphs (b)(2) and (3) of this section, failing to certify compliance as specified in § 12.7 will result in ineligibility as follows:

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(1) A Form AD-1026, or successor form, for the person must be on file with FSA on or before June 1 prior to the beginning of the reinsurance year (July 1) in order for the person to be eligible for any Federal crop insurance premium subsidies for the reinsurance year. Failure to file Form AD-1026, or successor form, with FSA on or before June 1 prior to the beginning of the reinsurance year (July 1) will result in ineligibility for premium subsidies for the entirety of that reinsurance year.

(2) A person will have until the first applicable crop insurance sales closing date to provide information necessary for the person's filing of a Form AD-1026 if the person:

(i) Is unable to file a Form AD-1026 by June 1 due to circumstances beyond the person's control, as determined by FSA; or

(ii) Files a Form AD-1026 by June 1 in good faith and FSA subsequently determines that additional information is needed, but the person is unable to comply by July 1 due to circumstances beyond the control of the person.

(3) A person who does not have Form AD-1026, or successor form, on file with FSA on or before June 1 prior to the beginning of the reinsurance year may be eligible for Federal crop insurance premium subsidy for the subsequent reinsurance year if the person can demonstrate they began farming for the first time after June 1 but prior to the beginning of the reinsurance year (July 1). For example, a person who started farming for the first time on June 15, 2015, will be eligible for Federal crop insurance premium subsidies for the 2016 reinsurance year without a Form AD-1026 on file with FSA. However, in that case, the person must file Form AD-1026 with FSA on or before June 1, 2016 to be eligible for premium subsidy for the 2017 reinsurance year.

(c) *Ineligibility for violations.* If a person is ineligible due to a violation of the provisions of this part, the timing and results will be as follows:

(1) Unless an exemption in this section or §12.5 applies, ineligibility for Federal crop insurance premium subsidy for a policy or plan of insurance under the Federal Crop Insurance Act (7 U.S.C. 1501–1524) due to a violation of the provisions of this part will:

(i) Not apply to the reinsurance year in which the violation occurred or any reinsurance year prior to the date of the final determination of a violation, including all administrative appeals of the determination, as determined by NRCS or FSA as applicable; and

(ii) Only apply to reinsurance years subsequent to the date of a final determination of a violation, including all administrative appeals of the determination, as determined by NRCS or FSA as applicable. A person who is in violation of the provisions of this part, as determined by FSA or NRCS, in a reinsurance year, will, unless otherwise exempted, be ineligible for any Federal crop insurance premium subsidy beginning with the subsequent reinsurance year. For example, a person who is determined to be in violation of the provisions of this part and has exhausted all administrative appeals on June 1, 2015, (2015 reinsurance year) will, unless otherwise exempted, be ineligible for Federal crop insurance premium subsidy effective July 1, 2015, the start of the 2016 reinsurance year, and will not be eligible for any Federal crop insurance premium subsidy for any policy or plan of insurance during the 2016 reinsurance year. Even if the person becomes compliant during the 2016 reinsurance year, the person will not be eligible for Federal crop insurance premium subsidy until the 2017 reinsurance year starting on July 1, 2016.

(2) Eligibility for Federal crop insurance premium subsidy for a policy or plan of insurance under the Federal Crop Insurance Act (7 U.S.C. 1501–1524) due to a violation of the provisions of this part will be based on FSA and NRCS final determinations, including all administrative appeals, regarding compliance with the provisions of this part.

(3) The amount of premium subsidy for an insured person will be reduced when any person with a substantial beneficial interest in the insured person is ineligible for premium subsidy under this part. The amount of reduction will be commensurate with the ineligible person's substantial beneficial interest in the insured person. The ineligible person's substantial beneficial interest in the insured person will be

determined according to the policy provisions of the insured person.

(4) Administrative appeals include appeals made in accordance with §12.12 and part 11 of this title, but do not include any judicial review or appeal, or any other legal action.

(d) *Exemption to develop and comply with an approved HEL conservation plan.* The following exemptions provide a delay in the requirement to develop and comply with an NRCS approved HEL conservation plan for certain persons.

(1) Persons subject to the provisions of this part regarding highly erodible land, specifically those related to section 1211(a) of the Food Security Act of 1985, as amended, for the first time solely due to amendments to that section by section 2611(a) of the Agricultural Act of 2014 (16 U.S.C. 3811(a)(1)), will have 5 reinsurance years after the date the person is determined to have HEL and has exhausted all administrative appeals, if applicable, to develop and comply with a conservation plan approved by NRCS before being ineligible for Federal crop insurance premium subsidies. The additional time to develop and comply with a conservation plan approved by NRCS applies only to persons who have not previously been subject to the highly erodible land conservation provisions of this part. The additional time provided in this paragraph does not apply to any person who had any interest in any land or crop, including an affiliated person, that was subject to the provisions of this part before February 7, 2014. The 5 reinsurance years to develop and comply with a conservation plan approved by NRCS starts:

(i) For persons who have no land with an NRCS HEL determination, the 5 reinsurance years begins the start of the reinsurance year (July 1) following the date NRCS makes a HEL determination and the person exhausts all their administrative appeals; or

(ii) For persons who have any land for which an NRCS HEL determination has been made and all administrative appeals have been exhausted, the 5 reinsurance years begins the start of the reinsurance year (July 1) following the date the person certifies compliance with FSA to be eligible for USDA bene-

fits subject to the conservation compliance provisions.

(2) Persons who meet all the following criteria will have 2 reinsurance years from the start of the reinsurance year (July 1) following the date the person certifies compliance with FSA to be eligible for USDA benefits subject to the conservation compliance provisions to develop and comply with a conservation plan approved by NRCS before being ineligible for Federal crop insurance premium subsidies:

(i) Were subject to the provisions of this part regarding highly erodible land, specifically those related to section 1211(a) of the Food Security Act of 1985 (16 U.S.C. 3811(a)(1)), as amended, any time before February 7, 2014;

(ii) Before February 7, 2014, stopped participating in all USDA programs subject to the provisions of this part regarding highly erodible land;

(iii) Would have been in violation of the provisions of this part regarding highly erodible land had they continued to participate in those programs after February 7, 2014; and

(iv) Are currently in violation of the provisions of this part regarding highly erodible land.

(e) *Exemption for prior wetland conversions completed prior to February 7, 2014.* No person will be ineligible for Federal crop insurance premium subsidies for a policy or plan of insurance under the Federal Crop Insurance Act (7 U.S.C. 1501–1524) for:

(1) Converting a wetland if the wetland conversion was completed, as determined by NRCS, before February 7, 2014; or

(2) Planting or producing an agricultural commodity on a converted wetland if the wetland conversion was completed, as determined by NRCS, before February 7, 2014.

(f) *Exemption for wetland conversion that impacts less than 5 acres.* The following exemption is for wetland conversion that impacts less than 5 acres of an entire farm:

(1) In lieu of ineligibility for Federal crop insurance premium subsidies for a policy or plan of insurance under the Federal Crop Insurance Act (7 U.S.C. 1501–1524) due to a wetland conversion violation or concurrent with a planned wetland conversion occurring after

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February 7, 2014, a person may, if approved by NRCS, pay a contribution to NRCS in an amount equal to 150 percent of the cost of mitigating the converted wetland, as determined by NRCS.

(2) A person is limited to only one exemption, as determined by NRCS, described in paragraph (f)(1) of this section per farm.

(3) NRCS will not refund this payment even if the person later conducts actions which will mitigate the earlier conversion.

(g) *Exemption for wetland conversion when a policy or plan of insurance is available to a person for the first time.* The following exemption is for wetland conversion when a policy or plan of insurance is available to the person for the first time.

(1) When a policy or plan of insurance that provides coverage for an agricultural commodity is available to the person, including as a person who is a substantial beneficial interest holder, for the first time after February 7, 2014, as determined by RMA, ineligibility for Federal crop insurance premium subsidies for such policy or plan of insurance due to a wetland conversion violation will only apply to wetland conversions that are completed, as determined by NRCS, after the date the policy or plan of insurance first becomes available to the person.

(2) The exemption described in paragraph (g)(1) of this section:

(i) Applies only to the policy or plan of insurance that becomes available to the person for the first time after February 7, 2014, as determined by RMA;

(ii) Does not exempt or otherwise negate the person's ineligibility for Federal crop insurance premium subsidies on any other policy or plan of insurance; and

(iii) Applies only if the person takes steps necessary, as determined by NRCS, to mitigate all wetlands converted after February 7, 2014, in a timely manner, as determined by NRCS, but not to exceed 2 reinsurance years.

(3) For the purposes of the paragraph (g)(1) of this section:

(i) A policy or plan of insurance is considered to have been available to the person after February 7, 2014, if, after February 7, 2014, in any county in

which the person had any interest in any acreage, including as a person who is a substantial beneficial interest holder:

(A) There was a policy or plan of insurance available on the county actuarial documents that provided coverage for the agricultural commodity; or

(B) The person obtained a written agreement to insure the agricultural commodity in any county; and

(ii) Changing, adding, or removing options, endorsements, or coverage to an existing policy or plan of insurance will not be considered as a policy or plan of insurance being available for the first time to a person.

(h) *Wetland conversion mitigation exemption.* Unless another exemption applies, the following exemption provides additional time to mitigate wetland conversions.

(1) A person determined to be in violation of the provisions of this part due to a wetland conversion occurring after February 7, 2014, will have 1 reinsurance year after the final determination of violation, including all administrative appeals, as determined by NRCS, to initiate a mitigation plan to remedy the violation, as determined by NRCS, before becoming ineligible for Federal crop insurance premium subsidies for a policy or plan of insurance under the Federal Crop Insurance Act (7 U.S.C. 1501–1524.). For example, if in May 2017, after NRCS has determined that a person is in violation for converting a wetland and the person has exhausted all administrative appeals, the person will have until June 30, 2018, to initiate a mitigation plan to remedy the violation before becoming ineligible for Federal crop insurance premium subsidies starting with the 2019 reinsurance year.

(2) Notwithstanding paragraph (h)(1) of this section, if a person determined to be in violation of the provisions of this part due to a wetland conversion occurring after February 7, 2014, as determined by NRCS, and is subject to the provisions of this part for the first time solely due to section 2611(b) of the Agricultural Act of 2014, such person will have 2 reinsurance years after the final determination of violation, including all administrative appeals, as determined by NRCS, to be implementing all practices in a mitigation

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plan to remedy the violation, as determined by NRCS, before becoming ineligible for Federal crop insurance premium subsidies for a policy or plan of insurance under the Federal Crop Insurance Act (7 U.S.C. 1501–1524).

(3) Administrative appeals include appeals made in accordance with § 12.12 and part 11 of this title, but do not include any judicial review or appeal, or any other legal action.

(i) *Good faith exemption.* The following is a good faith exemption for wetland conservation:

(1) A person determined by FSA or NRCS to be in violation, including all administrative appeals, of the provisions of this part due to converting a wetland after February 7, 2014, or producing an agricultural commodity on a wetland that was converted after February 7, 2014, may regain eligibility for Federal crop insurance premium subsidies for a policy or plan of insurance under the Federal Crop Insurance Act (7 U.S.C. 1501–1524) if all of the following criteria are met:

(i) FSA determines that such person acted in good faith and without the intent to violate the wetland conservation provisions of this part;

(ii) NRCS determines that the person is implementing all practices in a mitigation plan to remedy or mitigate the violation within an agreed-to period, not to exceed 2 reinsurance years; and

(iii) The good faith determination of the FSA county or State committee has been reviewed and approved by the applicable State Executive Director, with the technical concurrence of the State Conservationist; or District Director, with the technical concurrence of the area conservationist.

(2) In determining whether a person acted in good faith under paragraph (i)(1)(i) of this section, FSA will consider such factors as whether:

(i) The characteristics of the site were such that the person should have been aware that a wetland existed on the subject land;

(ii) NRCS had informed the person about the existence of a wetland on the subject land;

(iii) The person has a record of violating the wetland provisions of this part or other Federal, State, or local wetland provisions; or

(iv) There exists other information that demonstrates the person acted with the intent to violate the wetland conservation provisions of this part.

(3) After the requirements of paragraph (i)(1) of this section are met, FSA may waive applying the ineligibility provisions of this section to allow the person to implement the mitigation plan approved by NRCS. The waiver will apply for up to two reinsurance years.

(j) *Landlord and Tenant wetland violations relief.* The following provides landlord and tenant relief for wetland violations:

(1) Except as provided in (j)(2) of this section, the ineligibility of a tenant or sharecropper for Federal crop insurance premium subsidies for a policy or plan of insurance under the Federal Crop Insurance Act (7 U.S.C. 1501–1524) will, in lieu of ineligibility for premium subsidy, result in a reduction in the amount of premium subsidy paid by FCIC on all policies and plans of insurance for the landlord.

(i) The percentage reduction will be determined by comparing the total number of cropland acres on the farm on which the violation occurred to the total number of cropland acres on all farms in which landlord has an interest, as determined by FSA.

(ii) The farms and cropland acres used to determine the premium subsidy reduction percentage will be the farms and cropland acres of the landlord for the reinsurance year in which the tenant or sharecropper is determined ineligible.

(iii) The percentage reduction will be applied to all policies and plans of insurance of the landlord in the reinsurance year subsequent to the reinsurance year in which the tenant or sharecropper is determined ineligible.

(iv) If the landlord and tenant or sharecropper are insured under the same policy, the landlord will be ineligible for premium subsidy on that policy in lieu of a percentage reduction on that policy.

(2) A landlord will be ineligible for the premium subsidy on all policies and plans of insurance in the reinsurance year subsequent to the reinsurance year in which the tenant or sharecropper is determined ineligible if the

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production of an agricultural commodity on a converted wetland by the landlord's tenant or sharecropper is required under the terms and conditions of the agreement between the landlord and such tenant or sharecropper and such agreement was entered into after February 7, 2014, or if the landlord has acquiesced in such activities by the tenant or sharecropper.

(3) If all the requirements in paragraph (j)(4) of this section are met, in lieu of ineligibility for Federal crop insurance premium subsidies for all policies or plans of insurance under the Federal Crop Insurance Act (7 U.S.C. 1501-1524) for producing or planting an agricultural commodity on a wetland converted after February 7, 2014, the premium subsidy on all policies and plans of insurance of the ineligible tenant or sharecropper will be reduced.

(i) The percentage reduction will be determined by comparing the total number of cropland acres on the farm on which the violation occurred to the total number of cropland acres on all farms in which tenant or sharecropper has an interest, as determined by FSA.

(ii) The farms and cropland acres used to determine the premium subsidy reduction percentage will be the farms and cropland acres of the tenant or sharecropper for the reinsurance year in which the tenant or sharecropper is determined ineligible.

(iii) The percentage reduction will be applied to all policies and plans of insurance of the tenant or sharecropper in the reinsurance year subsequent to the reinsurance year in which the tenant or sharecropper is determined ineligible.

(iv) If the landlord and tenant or sharecropper are insured under the same policy, the tenant or sharecropper will be ineligible for premium subsidy on that policy in lieu of a percentage reduction on that policy.

(4) The provisions of paragraph (j)(3) of this section will not apply unless all the following are met:

(i) The tenant or sharecropper shows that a good-faith effort was made to comply by developing a plan, approved by NRCS, for the restoration or mitigation of the converted wetland in a timely manner and prior to any violation;

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(ii) The owner of such farm refuses to apply such a plan and prevents the tenant or sharecropper from implementing the approved plan;

(iii) FSA determines the lack of compliance is not a part of a scheme or device as described in § 12.10; and

(iv) The tenant or sharecropper actively applies the practices and measures of the approved plan that are within their control.

(k) *Evaluation of certification.* NRCS will evaluate the certification in a timely manner.

(1) A person who properly completes, signs, and files Form AD-1026, or successor form, with FSA certifying compliance with the provisions of this part will be eligible for Federal crop insurance premium subsidies for a policy or plan of insurance under the Federal Crop Insurance Act (7 U.S.C. 1501-1524) during the period of time such certification is being evaluated by NRCS, if an evaluation is required.

(2) A person will not be ineligible for Federal crop insurance premium subsidies for a policy or plan of insurance under the Federal Crop Insurance Act (7 U.S.C. 1501-1524) if:

(i) NRCS fails to complete a required evaluation of the person's Form AD-1026, or successor form in a timely manner after all documentation has been provided to NRCS; and

(ii) The person is subsequently determined to have been in violation of the provisions of this part during the time NRCS was completing the evaluation.

(3) The relief from ineligibility provided in paragraph (k)(2) of this section:

(i) Applies only to violations that occurred prior to or during the time NRCS is completing the required evaluation;

(ii) Does not apply to any violations that occur subsequent to NRCS completing the evaluation;

(iii) Does not apply if FSA or NRCS determines the person employed, adopted, or participated in employing or adopting a scheme or device, as provided in § 12.10, to evade the provisions of this part or to become eligible for the relief provided in paragraph (k)(2) of this section; and

(iv) Does not apply if the required evaluation is delayed due to unfavorable site conditions for the evaluation of soils, hydrology, or vegetation.

(1) *Failing to notify FSA of a change.* Requirements to pay equitable contribution for failing to notify FSA of a change are as follows.

(1) A person who fails to notify FSA of any change that could alter their status as compliant with the provisions of this part and is subsequently determined, by FSA or NRCS, to have committed a violation of the wetland conservation provisions of this part after February 7, 2014, will be required to pay to NRCS an equitable contribution.

(2) The amount of equitable contribution will be determined by NRCS, but will not exceed the total amount of Federal crop insurance premium subsidy paid by FCIC on behalf of the person for all policies and plans of insurance for all years in which the person is determined to have been in violation.

(3) A person who fails to pay the full equitable contribution amount by the due date determined by NRCS will be ineligible for Federal crop insurance premium subsidy on any policy or plan of insurance beginning with the subsequent reinsurance year. The person will be ineligible for Federal crop insurance premium subsidy for the entire reinsurance year even if full payment of the equitable contribution amount is received by NRCS during the reinsurance year.

[80 FR 22881, Apr. 24, 2015]

### Subpart B—Highly Erodible Land Conservation

#### § 12.20 NRCS responsibilities regarding highly erodible land.

In implementing the provisions of this part, NRCS shall, to the extent practicable:

- (a) Develop and maintain criteria for identifying highly erodible lands;
- (b) Prepare and make available to the public lists of highly erodible soil map units;
- (c) Make soil surveys for purposes of identifying highly erodible land; and

(d) Provide technical guidance to conservation districts which approve conservation plans and systems, in consultation with local county FSA committees, for the purposes of this part.

#### § 12.21 Identification of highly erodible lands criteria.

(a) *Basis for identification as highly erodible.* Soil map units and an erodibility index will be used as the basis for identifying highly erodible land. The erodibility index for a soil is determined by dividing the potential average annual rate of erosion for each soil by its predetermined soil loss tolerance (T) value. The T value represents the maximum annual rate of soil erosion that could occur without causing a decline in long-term productivity. The equation for measuring erosion is described below.

(1) The potential average annual rate of sheet and rill erosion is estimated by multiplying the following factors of the Universal Soil Loss Equation (USLE):

- (i) Rainfall and runoff (R);
- (ii) The degree to which the soil resists water erosion (K); and
- (iii) The function (LS), which includes the effects of slope length (L) and steepness (S).

(2) The potential average annual rate of wind erosion is estimated by multiplying the following factors of the Wind Erosion Equation (WEQ): Climatic characterization of windspeed and surface soil moisture (C) and the degree to which soil resists wind erosion (I).

(3) The USLE is explained in the U.S. Department of Agriculture Handbook 537, "Predicting Rainfall Erosion Losses." The WEQ is explained in the paper by Woodruff, N.P., and F. H. Siddaway, 1965, "A Wind Erosion Equation," Soil Science Society of America Proceedings, Vol. 29. No. 5, pages 602–608. Values for all the factors used in these equations are contained in the NRCS field office technical guide and the references which are a part of the guide. The Universal Soil Loss Equation, the Revised Universal Soil Loss Equation, and the Wind Erosion Equation and the rules under which NRCS